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APPLETREE INSTITUTE FOR EDUCATION INNOVATION Petitioner v. DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS Respondent & ADVISORY NEIGHBORHOOD COMMISSION 6A Intervenor	Case No.: CR-C-07-100087

ORDER GRANTING ANC 6A'S MOTION TO INTERVENE

I. INTRODUCTION

On or about November 15, 2007, the Department of Consumer and Regulatory Affairs ("DCRA") issued AppleTree Institute for Education Innovation ("AppleTree") a Notice to Revoke Building Permit Number 89587 ("Notice to Revoke"). On November 30, 2007, AppleTree filed a petition challenging the Notice to Revoke. On December 17, 2007, a representative of Advisory Neighborhood Commission ("ANC") 6A, Commissioner David

Holmes, submitted to this administrative court a statement expressing the ANC's interest in learning how it might participate in these proceedings.[1]

This administrative court issued a Case Management Order ("CMO") on December 27, 2007, setting a status conference for January 16, 2008. The CMO was served on the parties and on Commissioner Holmes. In addition to setting out a standard agenda for the status conference, the CMO instructed Commissioner Holmes to appear at the status conference and explain his submission of December 17, 2007. Commissioner Holmes appeared at the status conference and expressed ANC 6A's interest in intervening in this case to develop evidence and argue that Permit No. 89587 was properly revoked. I advised Commissioner Holmes to submit any motion to intervene promptly and said that I would not delay the ongoing proceedings in the meantime.

On January 30, 2008, Commissioner Holmes, purportedly acting on behalf of ANC 6A,[2] filed a Request Of Advisory Neighborhood Commission 6A To Intervene in these proceedings pursuant to OAH Rule 2812 ("Intervention Request"). In its Intervention Request, ANC 6A indicated that it had sought the parties' consent to intervention. According to ANC 6A, AppleTree had not consented, and DCRA had not responded. On February 11, 2008, AppleTree filed an opposition to the Intervention Request. DCRA filed no response, and at a status

[1] Mr. Holmes's submission of December 17, 2007, did not request leave to intervene or any other action by this administrative court and was not filed or served on the parties in accordance with OAH Rules.

[2] The Request Of Advisory Neighborhood Commission 6A To Intervene identifies the proposed intervenor variously as "ANC 6A," "David Holmes, for and on behalf of ANC 6A," "ANC 6A and Holmes" and "Holmes." Based on the arguments made in the Intervention Request and on the caption and discussion in *Bannum, Inc. v. D.C. Bd. of Zoning Adjustment*, 894 A.2d 423, 429 (D.C. 2006) (affirming a Board of Zoning Adjustment holding that an ANC had standing as an intervenor to appeal a DCRA decision to the Board of Zoning Adjustment), I construe the pending motion as a request for intervention by ANC 6A.

conference on March 18, 2008, DCRA's lawyer, Dennis Taylor, Esq., stated that the agency would take no position on the ANC's request to intervene.

Based on the Intervention Request and AppleTree's response, and for the reasons set forth in this Order, I grant ANC 6A's request to intervene.

II. CONCLUSIONS OF LAW AND DISCUSSION

Under the rules of this administrative court, "Anyone who has an interest in the subject matter of a case pending before the court, and who contends that the representation of his or her interest may be inadequate, may file a motion to intervene . . . ." OAH Rule 2816.2. Motions to intervene in OAH actions are decided "in accordance with the provisions of D.C. Superior Court Civil Rule 24." *Id*.

A motion to intervene must include a statement of grounds on which intervention is sought and a pleading "setting forth the claim or defense for which intervention is sought." *Id*. ANC 6A indicated in a statement filed under OAH Rule 2816.2, which accompanied its Intervention Request, that it wishes to intervene "in support of DCRA's defense that, because the construction permit in question here was erroneously issued, the DCRA Director correctly revoked the permit."

Under rules of the Superior Court of the District of Columbia, intervention may be sought either as a matter of right or by permission. Super. Ct. Civ. R. 24. A request to intervene *must* be granted "(1) When applicable law confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a

practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Super. Ct. Civ. R. 24(a). Intervention *may* be granted "(1) When applicable law confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common[, in either case taking into consideration] whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Super. Ct. Civ. R. 24(b). Rule 24 is intended to promote judicial economy by facilitating the resolution of related issues in a single lawsuit while preventing litigation from becoming unmanageably complex. *Calvin-Humphrey v. District of Columbia*, 340 A.2d 795, 799 (D.C. 1975); *see Me-Wuk Indian Cmty. v. Kempthorne*, 246 F.R.D. 315, 319 (D.D.C. 2007) ("intervention is a tool of judicial efficiency").

ANC 6A has not indicated whether it seeks intervention as of right or by permission, and I have therefore considered whether the proposed intervenor meets either standard.

A. Intervention as of Right – Rule 24(a)

ANC 6A does not assert that it has an "unconditional right" to intervene in this case under Super. Ct. Civ. R. 24(a)(1), and I have identified no such right in statutes or case law concerning the duties of Advisory Neighborhood Commissions or revocations of DCRA permits.

See D.C. Official Code §§ 1-207.38, 1-309.10 and § 2-509.[3] Even in the absence of such an "unconditional right" established by law, however, an applicant for intervention must be allowed to intervene if it "claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Super. Ct. Civ. R. 24(a)(2). The District of Columbia Court of Appeals has described the test under this rule as consisting of four parts: timeliness, interest, impairment of interest, and adequacy of representation. *Jones v. Fondufe*, 908 A.2d 1161, 1162-1163 (D.C. 2006). The court has also instructed that Rule 24(a) be interpreted "liberally," but not "indiscriminate[ly.]" *Vale Properties, Ltd. v. Canterbury Tales, Inc.*, 431 A.2d 11, 14 (D.C. 1981); *see McPherson v. D.C. Hous. Auth.*, 833 A.2d 991, 994 (D.C. 2003).

[3] ANC 6A also "does not assert that the OAH is bound by the 'great weight' requirement of the Advisory Commission Act." Intervention Request at 4. I agree, at least in the context of this proceeding. According to the great weight standard, "issues and concerns" raised in an ANC's written recommendations must be given great weight in certain deliberations by government agencies involved in "government actions." D.C. Official Code § 1-309.10(d)(3)(A). The matter before me, however, is a contested case under the District of Columbia Administrative Procedure Act, in which the only issue to be decided – and the issue as to which ANC 6A seeks to intervene – is whether Permit No. 89587 can be revoked because it was "issued in error." 12A DCMR 105.6(6). Although much of ANC 6A's Intervention Request focuses on the underlying question of whether Permit No. 89587 should have been issued in the first place, that question is only tangentially relevant here, and ANC 6A's fundamental and longstanding opposition to AppleTree's plans for 138 12th Street, NE, is simply irrelevant to the narrow legal issue that I must decide. Even assuming this were a "government action" under D.C. Official Code § 1-309.10(d)(3)(A), I would therefore not be required to give "great weight" to the ANC's underlying concerns about Permit No. 89587. *See Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment*, 634 A.2d 1234, 1241 (D.C. 1993), quoting *Bakers Local Union v. District of Columbia Bd. of Zoning Adjustment*, 437 A.2d 176, 179 (D.C. 1981) (The great weight standard "extends only to those issues and concerns that are 'legally relevant'").

1. Timeliness

No issue has been raised by AppleTree or DCRA as to the timeliness of ANC 6A's request to intervene. The request was made two weeks after the initial status conference in this case and about eight weeks after AppleTree filed its petition to review the revocation of Permit No. 89587. At the time ANC 6A filed its Intervention Request, discovery had just commenced and no dispositive motions had been filed. Although discovery is now underway, the proposed intervenor's participation should not cause significant delay or disruption. In its Intervention Request, ANC 6A expressed interest in seeking certain information from DCRA in discovery, but the ANC's areas of interest closely match AppleTree's comprehensive discovery requests.

Based on the considerations described above and in Sections II.A.2-4 below, I conclude that ANC 6A's request for intervention was timely. *See Emmco Ins. Co. v. White Motor Corp*., 429 A.2d 1385, 1387 (D.C. 1981) (in evaluating the issue of timeliness, a court should consider (1) the length of time between the proposed intervenor's learning, or having reason to learn, of its interest in the main action and the filing of the request for intervention; (2) the reason for any delay; (3) the stage of litigation at the time intervention is requested; (4) potential prejudice to the original parties if intervention is granted; and (5) potential prejudice to the proposed intervenor if intervention is denied); *United States v. AT&T,* 642 F.2d 1285, 1295 (D.C. Cir. 1980) .

2. ANC 6A's Interest in the Subject "Property or Transaction"

The only issue before this administrative court is the validity of the revocation of DCRA Permit No. 89587. Assuming the underlying issuance of the permit is not successfully challenged by ANC 6A or another aggrieved party, the overturning of the permit revocation will

allow construction at 138 12th Street, NE, to proceed. Affirmance of the revocation, however, will mean that construction may not proceed unless and until another permit is issued. ANC 6A argues that it has an interest in these proceedings because it has opposed issuance of the permit, and continues to do so, for reasons that include the health and safety concerns of residents and school children within ANC 6A's geographic boundaries.

The District of Columbia Court of Appeals has "adopted a broad reading of the word 'interest'" in Super. Ct. Civ. R. 24(a), holding that the interest test is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *McPherson*, 833 A.2d at 994 (internal citations omitted). The court has instructed, "While that interest must be 'significantly protectable' to require intervention, we have eschewed any attempt to define precisely the nature of the interest contemplated by the rule. Rather, we employ the interest test as a 'practical guide' to the handling of law suits." *Vale Properties, Ltd.*, 431 A.2d at 14 (internal citations omitted).

ANC 6A has a right to appeal decisions granting or refusing building permits within its geographic boundaries. *Bannum, Inc. v. D.C. Bd. of Zoning Adjustment*, 894 A.2d 423, 429-430 (D.C. 2006) (affirming Board of Zoning Adjustment ("BZA") holding, consistent with D.C. Official Code § 6-641.07(f),[4] that 11 DCMR 3199.1, "grants 'automatic' party status to any ANC 'in any appeal involving property located with in [its] area'"). Although these proceedings are not, technically or practically speaking, an appeal of a decision granting or refusing a building

[4] Under D.C. Official Code § 6-641.07(f), "Appeals to the Board of Adjustment may be taken by any person aggrieved, or organization authorized to represent such person, or by any officer or department of the government of the District of Columbia or the federal government affected, by any decision of the Inspector of Buildings granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map adopted under this subchapter."

permit, or an appeal to the BZA, a final order in this case may result in the allowance or prohibition of construction at 138 12th Street, NE. I therefore conclude that ANC 6A has a practical interest in this case entitled to recognition under Super. Ct. Civ. R. 24(a)(2).

3. Impairment of Interest

Similarly, the test of potential impairment of interest has been described in the analogous context[5] of Fed. R. Civ. P. 24(a)(2) as a "practical" one. *See San Juan County v. United States*, 503 F.3d 1163, 1200 (10th Cir. 2007) ("The issue is the practical effect of a judgment in favor of [an existing party], not the legally compelled effect").

In *Fund for Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 2003), a wildlife protection group brought suit against the U.S. Department of the Interior ("DOI") to challenge its decision to list a particular species of Mongolian sheep as "threatened," rather than "endangered," under the Endangered Species Act ("ESA") and therefore entitled to only limited protection against hunting and other harms. Several groups with economic interests in wild sheep hunting and related commerce sought to intervene as defendants, including "NRD," an agency of the Mongolian government involved in the export of Mongolian sheep to the United States. The Court of Appeals for the District of Columbia found that NRD had met the "impairment of interest" test for intervention as of right, even though the foreign agency would have had other options to protect its interest in the relatively unrestricted export of the Mongolian sheep affected by the DOI decision:

> [T]he NRD is "so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect [its]

[5] Because the federal and local rules on intervention are "substantially identical," federal court decisions are persuasive authority for interpreting the local rule. *Jones v. Fondufe*, 908 A.2d 1161, 1164 (D.C. 2006).

> interest." Fed. R. Civ. P. 24(a)(2). . . . [We read Fed. R. Civ. P. 24(a)(2)] "as looking to the 'practical consequences' of denying intervention, even where the possibility of future challenge to the regulation remains available." *Natural Res. Def. Council*, 561 F.2d at 909 (quoting *Nuesse*, 385 F.2d at 702). Regardless of whether the NRD could reverse an unfavorable ruling by bringing a separate lawsuit, there is no question that the task of reestablishing the status quo if the [plaintiff] succeeds in this case will be difficult and burdensome. *See id*. at 910 ("It is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation."). Moreover, as the NRD further argues, its loss of revenues during any interim period would be substantial and likely irreparable. *Cf. Mova Pharm*., 140 F.3d at 1076 (holding that danger of loss of market share due to denial of a preliminary injunction satisfied the third Rule 24(a)(2) factor).

Id. at 735 (alterations in the original). Under that "practical" standard, I conclude that ANC 6A's interest in preventing the proposed construction at 138 12th Street, NE, might be impaired by the outcome of these proceedings. I recognize, of course, that a final order in this case will have no effect on any legal right ANC 6A might have (or might have had) to *appeal* DCRA's underlying decision to issue Permit No. 89587. *See* 11 DCMR 3199.1(a)(4) and 3200.2; D.C. Official Code § 6-641.07(f). As a practical matter, however, ANC 6A's interest is at risk in these proceedings.

4. Adequacy of Existing Representation

ANC 6A contends that although its interest in this case is "aligned with DCRA's" and "consistent with DCRA's" (Intervention Request at 3), DCRA will not vigorously litigate the matter or adequately represent ANC 6A's interest because of the potential for intra-agency conflicts of interest and embarrassment. Intervention Request at 10. AppleTree asserts that DCRA's representation would be adequate, or should be presumed likely to be adequate, citing a recent decision by this administrative court in which neighboring property owners were not

allowed to intervene in an action brought against DCRA by a private party whose building permit had been revoked. *DCRA v. Vu*, OAH No. CR-C-06-100009, Memorandum Order on Motion to Intervene, 2006 D.C. Off. Adj. Hear. LEXIS 69 (August 1, 2006). In the *Vu* case, this administrative court found that applicants for intervention had not shown their interests would be inadequately represented by DCRA.

As a general matter, the burden of showing potentially inadequate representation is "not onerous." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986); *see Trbovich v. UMW*, 404 U.S. 528, 538 (U.S. 1972) ("The requirement . . . is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal") (internal citation omitted). The adequacy of a government entity's representation of the interests of a potential intervenor depends on the similarity of the public and private interests, the likelihood that similar legal arguments would be made by the government entity and the proposed intervenor, and the potential for conflicts of interest that could interfere with the government's ability to advance those arguments. *Dimond,* 792 F.2d at 192-3. A presumption of adequate representation may arise "when the representation being evaluated is that of a government agency" and "the representative is a governmental body or officer charged by law with representing the interests of the absentee." *NRDC v. U.S. EPA*, 99 F.R.D. 607, 610 (D.D.C. 1983), quoting *Commonwealth of Pa. v. Rizzo*, 530 F.2d 501, 505 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976). Although "intervention in suits in which the government is a party should not be lightly granted," *Calvin-Humphrey*, 340 A.2d at 800, courts "have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals,* 322 F.3d at 736.

In *Natural Resources Defense Council v. Costle*, the U.S. Court of Appeals for the District of Columbia Circuit granted intervention under Fed. R. Civ. P. 24(a)(2) despite an apparent "coincidence of interest" between an existing government party and a proposed intervenor. 561 F.2d 904, 912 (D.C. Cir. 1977). Certain rubber manufacturers had sought intervention in an action brought by environmental groups against the U.S. Environmental Protection Agency relating to regulation of various pollutants, and the court held, "Even when the interests of EPA and [proposed intervenors] can be expected to coincide . . . such as on the exclusion of a specific pollutant from regulation, that does not necessarily mean that adequacy of representation is ensured for purposes of Rule 24(a)(2)." Similarly, in a Second Circuit case cited in *Natural Resources Defense Council*, pharmacists and an association of pharmacists sought to intervene in a lawsuit brought by consumers against a state agency that had issued regulations prohibiting the advertising of prescription drug prices. The consumers and the proposed intervenors opposed the regulation, which the court found fostered "consumer ignorance" and interfered with comparison shopping. *New York Public Interest Research Group, Inc. v. Regents of University of N.Y.*, 516 F.2d 350, 351-352 (2d Cir. 1975). In granting intervention, which was supported by the government agency, the court noted the "likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would the [government agency]." *Id*.

In this case, the proposed intervenor acknowledges that it shares DCRA's "ultimate objective" – a determination that revocation of Permit No. 89587 is proper because the permit was issued "in error." Beyond that ultimate objective, however, the interests of DCRA and ANC 6A may quickly diverge, and there are strategies and arguments supporting the ultimate objective that ANC 6A might develop more aggressively than DCRA, such as those that suggest

intentional wrongdoing or recklessness by DCRA. In addition, in the absence of a clear definition of the term "in error," as it is used in 12A DCMR 105.6(6), DCRA and ANC 6A might be expected to take significantly different positions as to the grounds under which revocation of a building permit is proper.

On the issue of adequacy of representation, this case is distinguishable from *Vu* in at least two respects. First, DCRA opposed the motion for intervention in *Vu* (2006 D.C. Off. Adj. Hear. LEXIS 69 at *1) but has taken no position on intervention in this case. Although I hesitate to draw too much from DCRA's decision not to file an opposition paper or articulate any position on the matter, DCRA's silence remains noteworthy. *See New York Public Interest Research Group, Inc.,* 516 F.2d at 352 (intervention granted where there was an acknowledgment by agency that proposed intervenors "should have an opportunity to make their own arguments").

Second, although the proposed intervenors in *Vu* and in this case both raise a concern about the possibility of "malfeasance" by DCRA in the issuance of a building permit, ANC 6A also implies there may have been collusion between DCRA and AppleTree in the permit's issuance. Intervention Request at 5. ANC 6A's allegations are not especially compelling, but they are also not patently frivolous. Evidence elicited in testing those allegations could be relevant to the reasons for the permit's revocation. If such an intimation of collusion was made in *Vu*, it is not apparent from the Memorandum Order On Motion To Intervene.

ANC 6A also fears that DCRA will be an inadequate representative of its interest because of the potential for intra-agency conflicts of interest and embarrassment in the prosecution of this case. This concern may be especially acute because the issue here is the nature of an error made by DCRA in execution of its statutory duties. In order to prevail, DCRA need only show the

existence of an error that was sufficient to give it authority to revoke the permit under 12A DCMR 105.6(6). ANC 6A, in contrast, might have a legitimate interest in developing a more comprehensive picture of any "error" made by DCRA in issuance of the permit. This distinction amounts to more than minor disagreement about the "litigation strategy or objectives" with the party who would otherwise represent ANC 6A's interest. *Compare Chiglo v. City of Preston*, 104 F.3d 185 (8th Cir. 1997) ("the proposed intervenor cannot rebut the presumption of representation by merely disagreeing with the litigation strategy or objectives of the party representing him"), *with Jones v. Fondufe*, 908 A.2d at 1164 ("'unwilling[ness] to raise claims or arguments that would benefit the putative intervenor may qualify as an inadequate representative in some cases'") (quoting *Jones v. Prince George's County*, 348 F.3d 1014, 1019-1020 (D.C. Cir. 2003)).

I conclude that ANC 6A's interest would not be adequately represented by DCRA[6] and, consequently, that ANC 6A has established it meets all four elements of the test for intervention as of right. *Jones v. Fondufe*, 908 A.2d at 1161.

B. Permissive Intervention – Rule 24(b)

Intervention can also be based on a conditional right to intervene under applicable law or on common questions of law or fact in a proposed intervenor's claim or defense and the main action. In any case, permissive intervention requires a showing that intervention will not unduly "delay or prejudice the adjudication of the rights of the original parties." Super. Ct. Civ. R. 24(b).

[6] ANC 6A would also not be adequately represented by AppleTree, although AppleTree and ANC 6A have certain overlapping interests in establishing the circumstances of DCRA's issuance of Permit No. 89587. Such overlapping interests will limit the potential for burden and delay arising from the granting of intervention.

For the reasons set forth in Section II.A above, I find that ANC 6A has demonstrated that there are common questions of law or fact in the proposed claim and in the existing case between DCRA and AppleTree.

I also find that intervention by ANC 6A will not unduly delay this case or prejudice the parties. I recognize that intervention by the ANC raises some potential for delay and confusion. Most of the arguments and allegations made by ANC 6A in its Intervention Request are, at least on first inspection, irrelevant and distracting and should have been raised either in the original permitting proceedings or in an appeal of the issuance of Permit No. 89587. My job is not to second-guess any substantive decision made by DCRA to issue the permit in question, and I have no authority to do so. In short, I cannot affirm revocation of the permit simply because I find that the permit should not, *as a matter of law*, have been issued in the first place. The fact that the term "in error" is not defined in applicable statutes, regulations or case law leaves some room for interpretation of the limits of my authority. I have no reason to believe, however, that the drafters of 12A DCMR 105.6(6) intended the permit revocation process to be available as a backup appeal mechanism for intervenors who have no right to request or contest revocation on their own. Unless ANC 6A demonstrates otherwise, I will consider most of the facts it alleges and arguments it makes in its Intervention Request irrelevant to this case.

As the presiding administrative law judge in this matter, I have the authority to "limit the terms and conditions of intervention." OAH Rule 2816.3. I will exercise that authority as necessary to prevent undue "delay or prejudice" to AppleTree and DCRA in this case. Super. Ct. Civ. R. 24(b).

III. CONCLUSION

ANC 6A is entitled to intervene in this case as a matter of right and also meets the test for permissive intervention. Super. Ct. Civ. R. 24. ANC 6A may participate in these proceedings to show that Permit No. 89587 was issued "in error" (*see* 12A DCMR 105.6(6)) and was, therefore, properly revoked.

IV. ORDER

Based on the foregoing and the entire record in this case, it is, this 21st day of March, 2008:

ORDERED, that the Request Of Advisory Neighborhood Commission 6A To Intervene is **GRANTED;** ANC 6A may intervene to show that Permit No. 89587 was issued "in error."

March 21, 2008

_____/s/_____
Steven M. Wellner
Administrative Law Judge